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No. 83-948

In the Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK J. CONNOLLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Birnbaum v. *United States*, 588 F.2d 319 6

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 5-6

Borrell v. *International Communications Agency*, 682 F.2d 981 4

Brown v. *GSA*, 425 U.S. 820 4

Bush v. *Lucas*, No. 81-469 (June 13, 1983) 4

Duarte v. *United States*, 532 F.2d 850 6

Greenway v. *United States*, 163 Ct. Cl. 72 5

INS v. *FLRA*, 709 F.2d 724 4

Jackson v. *United States*, 428 F.2d 844 6

Jaffee v. *United States*, 592 F.2d 712, cert. denied, 441 U.S. 961 6

Laswell v. *Brown*, 683 F.2d 261, cert. denied, No. 82-5574 (Feb. 22, 1983) 6

Middlesex County Sewerage Authority v. *National Sea Clammers Association*, 453 U.S. 1 4

Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 4

Norton v. *United States*, 581 F.2d 390, cert. denied, 439 U.S. 1003 6

Perlongo v. *United States*, 215 Ct. Cl. 982 5

Page

Cases—Continued:

Piskadlo v. *Veterans' Administration*, 668 F.2d 82 4

Powers v. *United States*, 169 Ct. Cl. 626 5

Radin v. *United States*, 699 F.2d 681 6

Swaaley v. *United States*, 376 F.2d 857 6

United States v. *Mitchell*, 445 U.S. 535 ..... 3, 5

United States v. *Mitchell*, No. 81-1748 (June 27, 1983) 3, 5

United States v. *Testan*, 424 U.S. 392 ..... 3, 5, 6

White v. *Bloomberg*, 501 F.2d 1379 6

Constitution and statutes:

U.S. Const. Amend. I 1, 2, 5, 6

Back Pay Act, 5 U.S.C. 5596 6

5 U.S.C. 5596(a)(1) 6

5 U.S.C. 5596(b)(1) 6

Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.* 2

Postal Reorganization Act, 39 U.S.C. 101 *et seq.*:

39 U.S.C. 201 6

39 U.S.C. 1005(a)(1) 5

39 U.S.C. 1005(a)(2) 5

39 U.S.C. 1209(a) 5

Page

Constitution and statutes—Continued:

Tucker Act, 28 U.S.C. 1491 2

Pub. L. No. 91-375, § 6(c), 84 Stat. 775 ..... 2, 6

Pub. L. No. 97-164, 96 Stat. 25 *et seq.*:

§ 125, 96 Stat. 36 (to be codified at 28 U.S.C. 1292(d)(2) 2

§ 133(a), 96 Stat. 39 (to be codified at 28 U.S.C. 1491(a)(1) 3

5 U.S.C. 101 2

5 U.S.C. 104 6

5 U.S.C. 105 6

5 U.S.C. 7501(1) 4

5 U.S.C. 7511(a)(1)(A) 4

Miscellaneous:

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 4

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Petitioner contends that the United States Claims Court possessed jurisdiction under the Tucker Act to entertain his claim that he had been wrongfully removed, in violation of the First Amendment, from his position as a probationary employee of the United States Postal Service.

1. Petitioner was employed as a postal clerk for approximately six weeks. During that period he received two performance evaluations, both of which included "unsatisfactory" ratings in several areas. After the second such evaluation, he was separated from the Postal Service for unsatisfactory job performance. The separation occurred during his probationary period. Pet. App. A23-A24.

Petitioner then filed this action in the Court of Claims, asserting that his negative evaluations and subsequent dismissal were retaliation for his having filed a claim for compensation for an injury and complaints about a lack of

proper safety procedures. He sought reinstatement, back pay, damages, and correction of records. Pet. App. A2-A3, A23. The case was transferred to the Claims Court when it succeeded to the original jurisdiction of the Court of Claims (see *id.* at A24 n.2).

The Claims Court granted the government's motion for summary judgment on all issues except one (Pet. App. A1-A21). Specifically, the court ruled that petitioner could not base his claim on a contract with the United States (*id.* at A4), on Postal Service regulations (*id.* at A4-A5), or on the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* (Pet. App. A5-A16). But the Claims Court concluded that it had "jurisdiction over that portion of [petitioner's] claim which is based upon the first amendment" (*id.* at A19 (footnote omitted)).

On an interlocutory appeal (see Pub. L. No. 97-164, § 125, 96 Stat. 36, to be codified at 28 U.S.C. 1292(d)(2)), the court of appeals, hearing the case en banc, unanimously ordered that the complaint be dismissed in its entirety (Pet. App. A22-A31). The court of appeals agreed with the Claims Court that petitioner could not rely on Postal Service regulations (*id.* at A26-A27), because the Tucker Act grants the Claims Court jurisdiction over claims founded on a "regulation of an executive department" (28 U.S.C. 1491) and the Postal Service is not an executive department (see 5 U.S.C. 101; Pub. L. No. 91-375, § 6(c), 84 Stat. 775). The court of appeals then ruled that petitioner had no cause of action under the CSRA because the CSRA "established a comprehensive scheme for judicial review of adverse actions but at the same time deliberately precluded such review under that Act for probationary employees" (Pet. App. A27).

Finally, the court of appeals reversed the Claims Court's holding that it had jurisdiction over petitioner's First Amendment claim. The court of appeals noted that a suit

may be brought under the Tucker Act only on the basis of a constitutional provision that mandates the payment of compensation, and it held that "the first amendment[,] standing alone, cannot be so interpreted to command the payment of money" (Pet. App. A29). Since no statute authorized petitioner's suit seeking money from the United States for an alleged constitutional violation (*id.* at A30), the court of appeals held that the Claims Court could not entertain petitioner's claim that his discharge violated the Constitution. The court of appeals specifically did not "consider whether [petitioner] may make such a first amendment claim within the non-monetary jurisdiction of a district court, or in a district court suit against the Postal Service" instead of against the United States (*id.* at A29).

2. The Tucker Act limits the jurisdiction of the Claims Court to "claim[s] against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States * * *." 28 U.S.C. 1491(a)(1), as added by Pub. L. No. 97-164, § 133(a), 96 Stat. 39. But the Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976); see *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). "A substantive right must be found in some other source of law" (*United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10). Thus, the threshold question is not, as petitioner suggests, whether the CSRA or another statute has "foreclosed judicial review" or "precluded a[] private right of action" (Pet. i, 7); rather, it is whether petitioner has any cause of action to begin with.

a. Petitioner appears to have abandoned any attempt to found his claim on a regulation or a contract. It appears that petitioner continues to assert a statutory cause of action, but he does not identify any statute that gives probationary

Postal Service employees a right to sue the United States for adverse personnel actions.

The CSRA is certainly not such a statute. As both courts below noted, the CSRA reflects a deliberate decision by Congress to withhold procedural protections from probationary employees, with a few exceptions that are not relevant here. See Pet. App. A13-A15, A27-A28; 5 U.S.C. 7501(1) and 7511(a)(1)(A); S. Rep. 95-969, 95th Cong., 2d Sess. 45 (1978) (quoted at Pet. App. A28); *INS* v. *FLRA*, 709 F.2d 724, 728 (D.C. Cir. 1983); *Piskadlo* v. *Veterans' Administration*, 668 F.2d 82 (1st Cir. 1982). See also *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 18 n.28.

The CSRA establishes "an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures — administrative and judicial — by which improper action may be redressed" (*Bush* v. *Lucas*, slip op. 18). This Court has repeatedly held that courts should not supplement such a "painstakingly crafted" (Pet. App. A11) remedial scheme by creating additional, implied remedies. See, *e.g.*, *Bush* v. *Lucas, supra*; *Brown* v. *GSA*, 425 U.S. 820, 832-833 (1976); *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 19-21 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). See also *Borrell* v. *International Communications Agency*, 682 F.2d 981, 985-988 (D.C. Cir. 1982) (refusing to create an implied remedy under the CSRA in favor of a probationary employee).

Moreover, even if the CSRA were interpreted to create a cause of action in favor of some probationary employees, it would be wholly implausible to suggest that it creates such a right in favor of a probationary Postal Service employee. Pursuant to the Postal Reorganization Act and collective bargaining agreements entered into by the Postal Service,

most categories of Postal Service employees are not covered by the CSRA at all.[1] Petitioner could have sought a remedy under the relevant collective bargaining agreement and, possibly, under the National Labor Relations Act (see 39 U.S.C. 1209(a)), but not in a damages action brought directly against the United States on the basis of an implied statutory cause of action.[2]

b. Petitioner also cannot invoke the First Amendment as a basis for Tucker Act jurisdiction. As the court of appeals ruled, it is well settled that the United States may not be sued for damages arising from a constitutional violation unless the constitutional provision itself mandates the payment of money or a statute specifically authorizes such relief. See, *e.g.*, *United States* v. *Mitchell*, slip op. 10-11; *United States* v. *Testan*, 424 U.S. at 400-402; *United States* v. *Mitchell*, 445 U.S. at 538; *Bivens* v. *Six Unknown*

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[1]The Postal Reorganization Act provides that all Postal Service employees except "preference eligible" employees may be excluded from the procedural protections of the CSRA by a collective bargaining agreement. 39 U.S.C. 1005(a)(1) and (2). The Postal Service informs us that its national collective bargaining agreements exclude all non-preference eligible employees from the CSRA. We understand that petitioner was not a preference eligible employee.

[2]Petitioner relies (Pet. 7-8) on a "handful" (Pet. App. A16 n.12) of cases in which, he asserts, the Court of Claims reviewed adverse personnel actions taken against probationary employees. As the Claims Court noted (*id.* at A15-A16), these cases all antedate the CSRA, and it is doubtful that they survive the comprehensive reform of the area effected by the CSRA. Indeed, this line of cases appears to have been based on Civil Service Commission regulations that were superseded by the CSRA. See, *e.g.*, *Perlongo* v. *United States*, 215 Ct. Cl. 982, 983 (1977); *Powers* v. *United States*, 169 Ct. Cl. 626 (1965); *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963). In any event, petitioner appears to have abandoned any claim based on regulations; moreover, none of the cases he cites involved an employee of the Postal Service. We note that the en banc court of appeals, which succeeded to the jurisdiction of the Court of Claims, did not consider these decisions a barrier to dismissing petitioner's complaint.

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *Radin* v. *United States*, 699 F.2d 681, 684-685 & n.8 (4th Cir. 1983); *Laswell* v. *Brown*, 683 F.2d 261, 268 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *Jaffee* v. *United States*, 592 F.2d 712, 717-718 (3d Cir.), cert. denied, 441 U.S. 961 (1979); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); *Norton* v. *United States*, 581 F.2d 390, 393-394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978); *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

As the court of appeals noted, the terms of the First Amendment itself do not " 'mandat[e] compensation' " (*United States* v. *Testan*, 424 U.S. at 400 (citation omitted)), and no statute authorizes the payment of money for a violation of the First Amendment in these circumstances.[3] Petitioner appears to suggest (Pet. 12-13) that the Back Pay Act, 5 U.S.C. 5596, requires the payment of compensation for constitutional violations. But as the court of appeals explained (Pet. App. A30), the Back Pay Act alone does not give a federal employee the right to seek damages in court for a violation of the First Amendment, and in any event it is clear that the Back Pay Act no longer applies to Postal Service employees. See *White* v. *Bloomberg*, 501 F.2d 1379, 1381 n.2 (4th Cir. 1974). The Back Pay Act applies to employees of "Executive agenc[ies]" (5 U.S.C. 5596(a)(1) and (b)(1)), and when Congress created the Postal Service it specifically provided that the Postal Service is not an "executive agency." Compare 5 U.S.C. 104 and 105 with 39 U.S.C. 201 and Pub. L. No. 91-375, § 6(c), 84 Stat. 775.

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[3]Petitioner, like the Claims Court, relies on the Court of Claims' decisions in *Jackson* v. *United States*, 428 F.2d 844 (1970), and *Swaaley* v. *United States*, 376 F.2d 857 (1967) (see Pet. 8-12; Pet. App. A17-A20). But the court of appeals, which in any event could have overruled *Jackson* and *Swaaley*, correctly distinguished those cases on the ground that the plaintiffs there relied on statutes mandating the payment of compensation (see Pet. App. A29-30).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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